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**IN UNITED STATES DISTRICT COURT  
FOR THE CENTRAL DISTRICT OF CALIFORNIA**

JEREMY R. WHITELEY,

Plaintiff,

vs.

USAA CASUALTY INSURANCE  
COMPANY,

Defendant.

CASE NO.: 2:24-cv-00138-FLA-MAA

**DEFENDANT USAA CASUALTY  
INSURANCE COMPANY'S REPLY  
IN SUPPORT OF ITS MOTION FOR  
SUMMARY JUDGMENT AND  
OPPOSITION TO PLAINTIFF  
JEREMY R. WHITELEY'S CROSS-  
MOTION FOR SUMMARY  
JUDGMENT**

**Hearing Date:** March 14, 2025

**Hearing Time:** TBD

**Crtrm.:** 6B

**Judge:** Hon. Aenlle-Rocha

**Cmplt. Filed:** Jan. 5, 2024

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3 **I. INTRODUCTION**

4 USAA CIC has demonstrated, based on the undisputed material facts, it is  
5 entitled to judgment as a matter of law as to each of Whiteley's claims and its Motion  
6 should be granted and Whiteley's Cross-Motion denied.

7 At the outset, USAA CIC notes Whiteley disputes only *two* of the 62 material  
8 facts within the Separate Statement. Whiteley adds 31 additional "facts" in support of  
9 his Cross-Motion, the majority of which constitute argument, not fact, and are not  
10 material. These "facts" were added solely to draw dispute and objection from USAA  
11 CIC and create a false issue of fact where there is none.

12 At a minimum, the Court should summarily adjudicate the breach of contract  
13 claim. Whiteley concedes the only possible way USAA CIC's duty to defend him in  
14 the BCS Lawsuit could have been triggered was under the Umbrella Policy's  
15 personal injury term. Thereunder, USAA CIC agrees to provide a defense where the  
16 underlying suit was brought because of "injury arising out of . . . [the] oral, written or  
17 electronic publication of a false statement that defames a person's or organization's  
18 character or reputation". (S.S. 10.) As discussed below, the allegations within the  
19 BCS Complaint simply do not fall within the scope of the Umbrella Policy, there was  
20 no possibility of coverage, and USAA CIC correctly determined its duty to defend  
21 was not triggered.

22 As to the extracontractual claims, the undisputed facts further show USAA  
23 CIC's investigation of Whiteley's claim was reasonable and timely, a genuine dispute  
24 existed between the parties, and USAA CIC reasonably relied on the advice of  
25 counsel. Lastly, there is no evidence (clear and convincing or otherwise) a managing  
26 agent ratified USAA CIC's conduct, or that USAA CIC acted maliciously or  
27 oppressively.

28 For these and the foregoing reasons, USAA CIC's Motion should be granted  
and Whiteley's Cross-Motion denied.

1  
2 **II. THE DUTY TO DEFEND WAS NOT TRIGGERED**  
3

4 **A. No Allegations Within the BCS Complaint Regarding Defamation Are**  
5 **Attributable to Whiteley, and the Duty to Defend Was Not Triggered**

6 Whiteley concedes the only possibility for coverage to exist under the  
7 Umbrella Policy was through allegations within the BCS Complaint relating to  
8 defamation, which he argues constituted “personal injury”. In their totality, these  
9 allegations state:

10  
11 27. Beginning in the fall of 2021, Defendant McNamara started creating  
12 tension on BCS’s board and began regularly spreading gossip and slanderous lies  
13 about fellow board members among volunteers and in the survivor community.  
14 The parties engaged in a conflict resolution process with a consultant. The conflict  
15 resolution process was unsuccessful in large part because Defendant McNamara  
16 would not accept the consultant’s proposal that she step down from the board.

17 (S.S. 17.)

18  
19 45. In some cases, the harm caused by Defendants is irreparable, e.g., the  
20 breach of the trust of the public sought to be served by BCS, the unknown extent to  
21 which they have reviewed and destroyed BCS confidential information, emails,  
22 intellectual properties, and other files, and damaged relationships after Defendant  
23 McNamara and her colleagues at UnSilenced made defamatory statements to  
24 valued partners, resulting in strained and, in some cases, terminated valued  
25 relationships. In this lawsuit, BCS seeks an injunction to regain control of its  
26 digital assets and properties, as well as to recover damages, including statutory  
27 damages and penalties, resulting from Defendants’ intentional, wrongful, and  
28 unlawful conduct.

(S.S. 22.)

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47. As a direct and proximate result of Defendants' wrongful conduct, BCS has suffered extensive damages in excess of \$5,000 and in an amount to be proven at trial. Such damages include the expenses associated with investigating Defendants' wrongful conduct and engaging forensic experts, lost business opportunities and monetary donations, and disclosure of misleading information to the public.

(S.S. 23.)

48. BCS also seeks recovery for lost goodwill as a result of Defendant's dissemination of false information by impersonating BCS. Defendants have also greatly and unjustly enriched themselves using BCS's social media accounts and proprietary information at BCS's expense.

(S.S. 24.)

Even a cursory consideration of these paragraphs demonstrates Whiteley was excluded from any purportedly defamatory conduct.

Paragraph 27 is limited solely to conduct by McNamara. (S.S. 17.)

Paragraph 45 states "Defendant McNamara and her colleagues at UnSilenced made defamatory statements". (S.S. 22.) The phrasing of this paragraph implicates the conduct of McNamara and other colleagues (i.e. strangers to the BCS Complaint). (*Id.*) Had the drafters of the BCS Complaint intended to include Whiteley in this allegation, they would have. Indeed, the BCS Complaint is rife with allegations directed solely at Whiteley or "defendants", plural.

Whiteley attempts to create coverage through this paragraph based on the use 'defendants', plural, within a heading, ***not an allegation***, stating: "Defendants Form Unsilenced and Begin Withholding Access to BCS Accounts". (RSS 66.) Whiteley

1 claims USAA CIC should have deduced from this heading that he was included  
2 within the term “colleagues” in paragraph 45.

3 This sub-heading has nothing to do with the remainder of the allegations in the  
4 BCS Complaint, operates solely as an organizational tool, and does not implicate  
5 Whiteley in anything other than the formation of UnSilenced, Whiteley’s self-serving  
6 and vague statement that he considered himself “one of [McNamara’s] colleagues at  
7 UnSilenced following its formation” is not relevant to the potential for coverage, and  
8 would not have changed USAA CIC’s coverage determination. (RSS-67.)

9 Paragraph 47 references the wrongful conduct of “Defendants”, plural, but  
10 refers only to the alleged dissemination of “*misleading*”, not false, information. (S.S.  
11 23.) The dissemination of misleading information falls squarely outside the Umbrella  
12 Policy’s definition of personal injury, which requires “a false statement that *defames*  
13 *[BCS’s] character or reputation*”. (S.S. 9.) Notably, none of the allegations related  
14 to defamation in the BCS Complaint invoke any damage to BCS’ character or  
15 reputation. (S.S. 11-25.)

16 Paragraph 48 seeks recovery for the “Defendant’s”, singular, “dissemination of  
17 false information”. (S.S. 24.) Based on the prior allegations regarding specifically  
18 McNamara’s “slander”, this paragraph clearly relates only to her. Tellingly,  
19 paragraph 48 goes on to reference the “Defendants”, plural, unjust enrichment of  
20 themselves, impliedly joining Whiteley in the allegation of unjust enrichment and  
21 excluding him from the dissemination of false information. (*Id.*)

22 As Mark Israel testified, the BCS Complaint was carefully drafted. (S.S. 60-  
23 61.) The drafters knew Whiteley’s name and his role in BCS, and chose *not* to  
24 identify him in these allegations while providing the names of other non-parties or  
25 references to ‘colleagues’.

26 The allegations within the BCS Complaint are unambiguous and cannot be  
27 interpreted in any way apart from their plain meaning. As discussed at length above  
28



1 and within USAA CIC's Motion, there was no potential for coverage under either of  
2 the subject policies, and USAA CIC cannot have breached the contract.

3 **B. Extrinsic Evidence Would Not Have Impacted USAA CIC's Correct**  
4 **Coverage Determination**

5 Whiteley argues if USAA CIC had spoken with him, it would have learned  
6 certain facts he claims would have changed the coverage determination. (Dkt. 46 p.  
7 13-15.) Whiteley ignores that when an insurer "assume[s] the [insured's] version of  
8 the facts to be correct, but [finds] no potential for coverage anyway", there is no  
9 obligation to investigate extrinsic evidence. (*Turner v. State Farm Fire and Cas.*  
10 *Co.* (2001) 92 Cal.App.4th 681, 690.)

11 Here, USAA CIC spoke with and corresponded with Whiteley regarding the  
12 allegations in the BCS Complaint and his disagreement with the coverage  
13 determination multiple times. (S.S. 29, 48, 51, 52.) There is no evidence before this  
14 Court indicating USAA CIC did not assume Whiteley's general denial of the  
15 wrongdoing alleged in the BCS Complaint was true. But Whiteley's denial did not  
16 and could not change the phrasing and substance of the allegations in the BCS  
17 Complaint, upon which USAA CIC's coverage determination properly relied.

18 Further, Whiteley could have provided USAA CIC with whatever additional  
19 information he thought could be relevant to USAA CIC's investigation during these  
20 conversations. He did not. If Kaczmarek or Gonzalez had questions regarding the  
21 meaning of the allegations within the BCS Complaint, they would have asked. They  
22 did not. If Israel had questions regarding the meaning of the allegations, he would  
23 have instructed Kaczmarek or Gonzalez to discuss them with Whiteley. He did not.

24 This is because the plain meaning of the allegations within the BCS Complaint  
25 was clear. No further clarification from Whiteley, or anyone else, was needed for  
26 USAA CIC to determine whether its duty to defend was triggered under the Policy.

27 Even in his supporting declaration, Whiteley points to no extrinsic information  
28 that would have impacted USAA CIC's coverage determination. (Dkt. 50.) Whiteley

1 states he “would have readily confirmed that I formed UnSilenced” and he  
2 considered himself a “colleague” of McNamara’s. (RSS 67; Dkt. 50 at ¶6.) As  
3 discussed above, the phrasing of paragraph 45 within the BCS Complaint shows the  
4 use and meaning of the word “colleagues”, rather than Whiteley or plural defendants,  
5 indicated Whiteley’s exclusion. Whiteley’s identification of himself as a colleague of  
6 McNamara’s has no bearing on the allegations in the BCS Complaint.

7 Where extrinsic evidence would not have changed USAA CIC’s coverage  
8 determination, Whiteley’s argument fails.

9 **C. Even if the Duty to Defend Were Triggered, Coverage Was Otherwise**  
10 **Excluded**

11 The Umbrella Policy unambiguously excludes from coverage any allegations  
12 related to personal injury which arise out of a “criminal act”, “any contract or  
13 agreement”, or a false statement made with knowledge of the falsity or “reckless  
14 disregard for the truth”. (S.S. 10.)

15 As to the “criminal act” exclusion, Whiteley argues because “criminal liability  
16 was neither alleged nor proven” in the BCS Lawsuit, this should not apply. (Dkt. 46  
17 at p. 17.) Yet USAA CIC’s investigation and coverage determination turns on the  
18 allegations within the third-party complaint, not what is proven or unproven during  
19 ensuing litigation. Indeed, taking Whiteley’s argument to its logical conclusion, an  
20 insurer would be unable to make any coverage determination until the third-party  
21 complaint was resolved. The BCS Complaint contained causes of action solely for  
22 violations of criminal statutes and based on that the “criminal act” exclusion applied  
23 to exclude coverage. (S.S. 3.)

24 As to the “contract or agreement” exclusion, Whiteley argues – without  
25 citation to any law – this exclusion only applies where a contract or agreement is  
26 proven, rather than alleged. (Dkt. 46 at 18.) Again, taking Whiteley’s argument to its  
27 logical conclusion would render the exclusion meaningless. An insurer would never  
28 be able to demonstrate its duty to defend was excluded on these grounds if proof of a

1 contract or agreement was a prerequisite. Allegations regarding the existence of an  
2 agreement upon which the operable conduct was based is sufficient under the  
3 Umbrella Policy and California law for the exclusion to apply.

4 Here, the BCS Complaint contains multiple allegations that Whiteley and  
5 McNamara acted based upon their agreement to cause BCS harm and unjustly enrich  
6 themselves. (S.S. 13, 24.) These allegations were sufficient to indicate USAA CIC's  
7 duty to defend, if triggered (and it was not), was nevertheless excluded.

8 As to the "knowledge of falsity" exclusion, Whiteley again argues the  
9 exclusion is inapplicable based on a lack of evidence in discovery in the BCS  
10 Lawsuit indicating his knowledge of falsity. (Dkt. 46 at 15-16.) But the Umbrella  
11 Policy additionally excludes coverage where the false statement was made "with  
12 reckless disregard for the truth". (S.S. 10.)

13 As Whiteley notes, this Court previously held the allegations within the BCS  
14 Complaint "*may have reasonably given rise to the inference that any actionable*  
15 *defamatory statement was made with knowledge of its falsity or reckless disregard*  
16 *for its truth*". (Dkt. 42 at 8.) Whiteley fails to set forth any reason or argument why  
17 the Court's prior conclusion should not stand.

18 Further, the allegations within the BCS Complaint describe a spree of  
19 intentional conduct designed to harm BCS. (S.S. 11-25.) Whiteley cannot credibly  
20 claim the totality of the allegations do not indicate conduct engaged in with, at a  
21 minimum, reckless disregard for the truth.

22 Where USAA CIC has demonstrated multiple exclusions apply to the  
23 allegations within the BCS Complaint, it was under no obligation to defend Whiteley,  
24 it did not breach the contract, and its Motion should be granted.

**D. The BCS Complaint is Based Entirely on Intentional Conduct, For Which Coverage is Not Extended Under California Law**

Although the Umbrella Policy does not set forth a specific exclusion for intentional conduct, in California “by statute, and as a matter of public policy, the insurer may not provide coverage for willful injuries by the insured against a third party”. (Cal. Ins. Code. § 533; *Waller v. Truck Ins. Exchange, Inc.*, 11 Cal.4th 1, 18 (1995).)

The allegations within the BCS Complaint focus solely on willful, intentional conduct by Whiteley. (S.S. 11-25.) BCS claimed Whiteley “acted intentionally . . . to obtain and convert secret, confidential, and proprietary information”, “exercised an extreme act and maliciously accessed BCS’s account with Google”, “maliciously attempted to remove and/or gain control of the BCS website”, and “attempted or succeeded at changing the content of the [BCS] website”. (S.S. 11-16.)

Where the BCS Complaint alleged only intentional conduct, and contained no indication Whiteley’s acts could have been merely negligent or accidental, under California law USAA CIC’s duty to defend was not triggered and it properly denied coverage for the claim.

**E. Financial Damages Do Not Trigger Duty to Defend**

California law is clear where a third-party complaint alleges solely financial or economic damages, the duty to defend is not triggered – regardless of the terms within the subject policy. The Supreme Court held in *Waller* that “strictly economic losses like lost profits, loss of goodwill, loss of the anticipated benefit of a bargain, and loss of an investment, do not constitute damage or injury”. (*Waller v. Truck Ins. Exch.*, 11 Cal. 4th 1, 19 (1995).) Whiteley claims – without citation to any legal support whatsoever – that this long-standing concept should not apply in the context of the duty to defend based on “personal injury” allegations. (Dkt. 46 at 19-20.)

Whiteley cannot avoid the precedential holdings of multiple state and federal courts indicating economic losses are not actionable in the context of a duty to

1 defend. (Dkt. 45-1 at 23.) Here, BCS claimed it was unable to promote a  
2 documentary, lost online traffic to its website, “lost business opportunities”, “lost  
3 goodwill”, and breached “the trust of the public”, that its confidential information  
4 was destroyed and business relationships damaged, service it provided to the public  
5 was interrupted, and claimed damages “in excess of \$5,000”. (S.S. 20-24.)

6 Absent from the BCS Complaint is any allegation regarding tangible damage  
7 to property. As such, USAA CIC’s duty to defend was not triggered and its Motion  
8 should be granted.

9 **F. Schratz’s Coverage Opinions Should be Stricken and Disregarded**

10 The Court should strike and disregard statements within Whiteley’s supporting  
11 declaration of its insurance claim handling expert, Jim Schratz, related to whether  
12 USAA CIC’s duty to defend was triggered by the allegations within the BCS  
13 Complaint. (Dkt. 49.) The interpretation of an insurance policy is a pure question of  
14 law. (*Waller v. Truck Ins. Exch.* (1995) 11 Cal.4th 1, 18.)

15 Because interpretation of an insurance policy is an issue of law, it is not a  
16 proper subject for expert testimony. “Unless a contract is deemed ambiguous or there  
17 is a term of the contract that requires an expert’s explanation, it is improper for an  
18 expert to interpret or construe a contract in his opinion.” (*Aya Healthcare Services*  
19 *Inc. v. AMN Healthcare, Inc.*, 613 F.Supp.3d 1308, 1320 (S.D. Cal. 2020). Matters of  
20 law are “inappropriate subjects for expert testimony”. (*Aguilar v. Int’l*  
21 *Longshoremen’s Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992).)

22 It has been held frequently in California that “opinion evidence is completely  
23 irrelevant to interpret an insurance contract”. (*Chatton v. National Union Fire Ins.*  
24 *Co.*, 10 Cal.App.4th 846, 865 (1992); *California Shoppers, Inc. v. Royal Globe Ins.*  
25 *Co.*, 175 Cal.App.3d 1, 35 (1985).)

26 It is inappropriate for Schratz to set forth these opinions, and they should not  
27 be considered by the Court as providing support for Whiteley’s claims regarding  
28

1 whether USAA CIC's duty to defend was triggered by the allegations in the BCS  
2 Complaint.

3 Where the undisputed facts demonstrate USAA CIC's duty to defend was not  
4 triggered, Whiteley's breach of contract claim fails and USAA CIC's Motion should  
5 be granted.

6  
7 **III. WHITELEY'S BREACH OF THE IMPLIED COVENANT FAILS**  
8 **WHERE USAA CIC ACTED REASONABLY, RELIED UPON THE ADVICE**  
9 **OF COUNSEL, AND THERE WAS A GENUINE DISPUTE REGARDING**  
10 **COVERAGE**

11 The undisputed material facts demonstrate USAA CIC conducted a prompt and  
12 reasonable investigation, and as a matter of law summary judgment should be granted  
13 in USAA CIC's favor as to Whiteley's claim for breach of the implied covenant of  
14 good faith and fair dealing.

15 As discussed at length, where USAA CIC's duty to defend was not triggered  
16 and no benefits were available under the Umbrella Policy, there can be no breach of  
17 contract claim and Whiteley's attendant breach of the implied covenant of good faith  
18 and fair dealing claim likewise fails as a matter of law. (*Waller, supra*, 11 Cal. 4<sup>th</sup> 36;  
*Benavides v. State Farm Gen. Ins. Co.*, 136 Cal. App. 4<sup>th</sup> 1241, 1250 (2006).)

19 **A. USAA CIC's Investigation Was Reasonable as a Matter of Law**

20 California law dictates that an insurer's investigation be reasonable – not  
21 perfect. (*Morris v. Paul Revere Life Ins. Co.* (2003) 109 Cal.App.4<sup>th</sup> 966, 977;  
22 *Careau & Co. v. Sec. Pac. Bus. Credit, Inc.*, (1990) 222 Cal. App. 3d 1371, 1395.))  
23 The law further states an insurer's investigation should not be considered with the  
24 benefit of hindsight. (*Wilson v. 21<sup>st</sup> Century Ins. Co.*, 42 Cal. 4<sup>th</sup> 713, 723 (2007)  
25 [“An insurer's good or bad faith must be evaluated in light of the totality of the  
26 circumstances surrounding its actions”].) The proper consideration is what  
27 Kaczmarek, Gonzalez, Holmes, and Israel knew at the relevant period, and whether  
28



1 their responsive steps taken and decisions made based on that information was  
2 reasonable.

3 It cannot credibly be disputed that USAA CIC promptly, reasonably, and  
4 thoroughly investigated and handled Whiteley's claim. As detailed in USAA CIC's  
5 Motion, Kaczmarek immediately reviewed the BCS Complaint, the subject policies,  
6 and spoke with Whiteley. (S.S. 28-29.) The BCS Complaint was then reviewed  
7 internally within USAA CIC by Kaczmarek's manager and a director. (S.S. 31-33;  
8 35-39.) When USAA CIC determined a coverage question existed, it reasonably  
9 retained outside counsel to provide recommendations regarding whether the duty to  
10 defend was triggered. (S.S. 34, 40, 41, 46.) Israel reviewed the BCS Complaint and  
11 relayed his opinion that the allegations therein did not fall within the scope of either  
12 the Homeowners or Umbrella Policies, and accordingly that USAA CIC did not owe  
13 Whiteley a legal defense. (S.S. 46-47.) Israel's opinions were well-supported by the  
14 terms of the Policy and California law. (*Id.*)

15 When Whiteley retained counsel and disputed USAA CIC's coverage  
16 determination, USAA CIC again sought recommendations from Israel as to whether,  
17 based on Whiteley's counsel's correspondence, USAA CIC's coverage determination  
18 should be revised. (S.S. 53-56.) Israel considered the new information and  
19 recommended USAA CIC's coverage determination be affirmed. (S.S. 57-58.)

20 USAA CIC's coverage determination was reasonably based on its own  
21 investigation of Whiteley's claim and the advice of counsel, who conducted an  
22 independent review and investigation.

23 Throughout the handling of the claim, Kaczmarek and Gonzalez  
24 communicated with Whiteley regularly. (S.S. 29, 42-45, 48, 49, 59.) When Whiteley  
25 escalated his claim to USAA CIC's Member Advocacy Team, USAA CIC promptly  
26 handled the dispute. (S.S. 50.) Whiteley, on the other hand, claimed he had never  
27 spoken to Kaczmarek before and recorded at least one phone call without obtaining  
28

1 his consent. (S.S. 51.) Whiteley’s argument that USAA CIC “failed to return phone  
2 calls” is simply not supported by the record. (Dkt. 46 at 23; S.S., generally.)

3 At no point did anyone at USAA CIC intentionally lie to Whiteley. (S.S. 62.)  
4 USAA CIC’s statements to Whiteley throughout the handling of the claim simply do  
5 not rise to the level of a breach of the implied covenant of good faith and fair dealing.  
6 This is especially true where USAA CIC’s coverage determination was affirmed  
7 multiple times and explained to Whiteley repeatedly.

8 Lastly, Schratz’s opinions regarding USAA CIC’s investigation do not  
9 constitute definitive evidence of bad faith.<sup>1</sup> While expert opinion can be helpful to the  
10 factfinder at trial, in the context of the Court’s consideration of undisputed material  
11 facts and their impact on the causes of action as a matter of law on a motion for  
12 summary judgment, they should be given little weight.

13  
14 **B. There Was a Genuine Dispute Between the Parties**

15 As stated in USAA CIC’s Motion, where there is a reasonable and genuine  
16 dispute as to the existence of coverage, under California law the insurer “is not liable  
17 in bad faith.” (*Chateau Chamberay Homeowners Ass’n v. Assoc’d Int’l Ins. Co.* 90  
18 Cal.App.4th 335, 347, (2001); *Wilson v. 21st Century Ins. Co.*, 42 Cal. 4th 713, 724  
19 (2007).) The undisputed facts demonstrate that USAA CIC conducted a reasonable  
20 and prompt investigation, including retaining outside counsel to provide  
21 recommendations, and determined in good faith that its duty to defend Whiteley in  
22 the BCS Lawsuit simply was not triggered under the terms of the Policy.

23 Whiteley claims the genuine dispute doctrine is inapplicable in the context of  
24 an insurer’s duty to defend. (Dkt. 46 at 21-22.) Yet Whiteley is unable to cite to a  
25 single case holding the genuine dispute doctrine cannot or should not be considered

26 \_\_\_\_\_  
27 <sup>1</sup> To the extent USAA CIC’s Motion as to the breach of implied covenant claim is  
28 denied, USAA CIC notes Schratz’s opinions will be rebutted by its own  
insurance claim handling expert, Paul Hamilton.



1 in a court's evaluation of a claim for breach of the implied covenant of good faith and  
2 fair dealing in a duty to defend case. (*Id.*)

3 Here, the genuine dispute doctrine is particularly relevant where two  
4 experienced attorneys – Israel and Whiteley's counsel – disagreed as to whether the  
5 allegations within the BCS Complaint triggered the duty to defend. This is precisely  
6 the type of scenario the genuine dispute doctrine is meant to address.

7 Where the undisputed material facts demonstrate USAA CIC's investigation of  
8 Whiteley's claim and coverage determination was reasonable, timely, and well-  
9 supported, as a matter of law USAA CIC did not breach the implied covenant of good  
10 faith and fair dealing, and its Motion should be granted.

#### 11 **IV. WHITELEY'S CLAIM FOR PUNITIVE DAMAGES FAILS**

12 The undisputed material facts demonstrate USAA CIC is entitled to summary  
13 judgment of Whiteley's claim for punitive damages.

14 Whiteley does not dispute to be successful on his claim for punitive damages  
15 he must demonstrate by clear and convincing evidence that some conduct by USAA  
16 amounted to "oppression, fraud, or malice", *and* that "an officer, director, or  
17 managing agent" of USAA either engaged in the conduct themselves or otherwise  
18 had advance knowledge and consciously disregarded, or authorized or ratified the  
19 conduct. (Cal. Civ. Code § 3294(a)(b) (emphasis added).)

20 As a threshold matter, Whiteley's argument that evidentiary standards of proof  
21 are somehow ignored or lessened at summary judgment versus trial is unsupported,  
22 misleading and should be disregarded. Under clear California law, regardless of the  
23 stage of litigation, Whiteley has the burden of proving every element of the punitive  
24 damages claim to a clear and convincing evidence standard. (Cal. Civ. Code §  
25 3294(a) ("where it is proven by clear and convincing evidence").)

26 At least one California court has noted, albeit in the context of a motion for  
27 nonsuit: "if plaintiff is to prevail on a claim for punitive damages, the evidence will  
28 have to be clear and convincing to the trier of fact. The claim must be evaluated in

1 that light, and on a motion for nonsuit, ***both the trial and appellate courts must view***  
2 ***the evidence with that higher burden in mind***". (*Hoch v. Allied-Signal, Inc.*, 24  
3 Cal.App.4th 48, 59 (1998) [emphasis added]; *Mazik v. Geico General Ins. Co.*, 35  
4 Cal. App.5th 455 (2019) ("the clear and convincing evidence standard was adopted  
5 for the edification and guidance of the trial court").)

6 Thus, to defeat USAA CIC's Motion, Whiteley must demonstrate both  
7 malicious, oppressive, or fraudulent conduct ***and*** ratification by a managing agent to  
8 the clear and convincing standard.

9 Here, as demonstrated by both USAA CIC's Motion and Whiteley's  
10 Opposition, based on the undisputed material facts no reasonable jury could find  
11 Whiteley has met his burden, and the claim for punitive damages should be disposed  
12 of as a matter of law for two standalone reasons.

13 First, and fatally, Whiteley has not proffered any evidence whatsoever that a  
14 managing agent of USAA CIC engaged in or otherwise ratified any conduct in the  
15 handling of the claim pursuant to Section 3294(b). Whiteley agrees a managing agent  
16 must "exercise substantial independent authority and judgment in their corporate  
17 decision making so that their decisions ultimately determine corporate policy".  
18 (*White v. Ultramar, Inc.*, 21 Cal. 4th 563, 566-567 (1999); Motion at 27.) Instead,  
19 Whiteley ignores longstanding California jurisprudence and claims, based solely on  
20 Gonzalez's designation during this litigation as USAA CIC's Rule 30(b)(6) witness  
21 and her testimony relative to her roles and responsibilities, that a managing agent or  
22 corporate officer of USAA CIC somehow took part in or ratified conduct pursuant to  
23 Section 3294. (Dkt. 46 at 26-27.)

24 This is purely conjecture and legal argument. Whiteley points to no sworn  
25 testimony, corporate document, or other evidence that could possibly indicate  
26 Gonzalez's decisions impacted USAA CIC's corporate wide policy. (Dkt. 46,  
27 generally.) Indeed, Gonzalez's sworn declaration submitted in support of USAA  
28 CIC's Motion states she has no authority to create or impact corporate decisions,

1 policies, or procedures. (USAA CIC's Response to the Statement of Genuine  
2 Disputes of Material Fact and Additional Material Facts, No. 95.)

3 On these grounds, no reasonable jury could find a managing agent, officer or  
4 director of USAA CIC engaged in or ratified any of the conduct alleged to support  
5 Whiteley's punitive damages claim under California law. Absent any evidence of  
6 ratification by a managing agent, Whiteley cannot establish an essential element of  
7 the punitive damages claim and it should be summarily adjudicated.

8 Second, within his Response to USAA CIC's Separate Statement of Facts,  
9 Whiteley does not dispute the material facts themselves, and instead provides a  
10 lengthy and editorialized recitation of the underlying claim handling and USAA  
11 CIC's coverage determination in a weak attempt to inject factual issues where there  
12 are none. As discussed, even when the undisputed facts are viewed in the light most  
13 favorable to Whiteley, USAA CIC's conduct simply does not rise to the level of  
14 sufficiently egregious malice, fraud, or oppression as a matter of California law.  
15 Instead, the undisputed facts demonstrate USAA CIC investigated Whiteley's claim  
16 and determined its duty to defend was not triggered based on the terms of the  
17 Umbrella Policy and the BCS Complaint. Whiteley's general disagreement with the  
18 handling of his claim and USAA CIC's coverage determination does not hold water  
19 against his significant burden of proof on the punitive damages claim.

20 Accordingly, USAA CIC has demonstrated Whiteley cannot meet his burden  
21 of proof as to his claim for punitive damages, and its Motion should be granted.

22  
23 Dated: February 21, 2025

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**CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 11-6.2**

The undersigned, counsel of record for USAA Casualty Insurance Company,  
certifies that this brief contains 4,189 words, which complies with the word limit of  
L.R. 11-6.1.

Dated: February 21, 2025

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